

NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(b). Summary disposition decisions of this Court do not create legal precedent and are not available in a publicly accessible electronic database. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DON NANTHAVONG,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12774
Trial Court No. 3AN-11-6433 CI

SUMMARY DISPOSITION

No. 0001 — March 6, 2019

Appeal from the Superior Court, Third Judicial District,
Anchorage, Paul Olson, Judge.

Appearances: Owen Shortell, Law Office of Owen Shortell,
under contract with the Office of Public Advocacy, Anchorage,
for the Appellant. Terisia K. Chleborad, Assistant Attorney
General, Office of Criminal Appeals, Anchorage, and Jahna
Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Harbison, Judge, and Joannides and Smith, Senior
Superior Court Judges.*

Don Nanthavong appeals the denial of his petition for post-conviction relief, arguing that his trial attorney was ineffective in not hiring an interpreter for him during his trial. We affirm the superior court's denial of the petition because the court's

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

finding that Nanthavong could adequately understand the court proceedings was not clearly erroneous.¹

Nanthavong was convicted of multiple felonies in February 2007 in connection with a sexual assault and robbery.² Nanthavong appealed these convictions based on a jury instruction issue, and the convictions were affirmed by this Court.³

Nanthavong subsequently filed an application for post-conviction relief in February 2011. The gravamen of his claim was that his trial attorney should have hired a translator for trial because his limited command of English interfered with his ability to understand some of the complex or subtle issues at trial — primarily relating to the DNA evidence upon which the State relied — which interfered with his ability to evaluate whether to testify and whether to accept the State’s offer during plea negotiations. (Nanthavong asserts on appeal that the trial judge suppressed part of his statement due to his poor English, however, the trial judge’s ruling stated that portions of Nanthavong’s interview were suppressed due to *Miranda* violations.)

The superior court held an evidentiary hearing, focusing on whether Nanthavong’s English comprehension prevented him from understanding the weight of the evidence against him when deciding whether to accept the State’s plea offer, or deciding whether he would testify at trial. An interpreter was present. Nanthavong called four witnesses: Randall Cavanaugh (his private sentencing attorney), Pat

¹ See *Vizcarra-Medina v. State*, 195 P.3d 1095, 1099 (Alaska App. 2008).

² AS 11.41.410(a)(1) (two counts of first-degree sexual assault); AS 11.41.500(a)(1) (one count of first-degree robbery); AS 11.46.300(a)(1) (one count of first-degree burglary); AS 11.41.210(a)(1) (one count of second-degree assault); AS 11.41.220(a)(1)(A) (two counts of third-degree assault); AS 11.46.130(a)(1) (one count of second-degree theft); AS 11.41.250 (one count of reckless endangerment).

³ See *Nanthavong v. State*, 2010 WL 881732 (Alaska App. Mar. 10, 2010) (unpublished).

Xayaprasedth (his ex-girlfriend), Nanthavong himself, and Joseph Josephson (his private trial attorney). The State called two witnesses: Lauren Edades (an Alaska Department of Motor Vehicles records custodian) and Kenneth McCoy (the detective who conducted Nanthavong's initial police interrogation). After hearing the evidence, the superior court denied the petition. The court found that Nanthavong sufficiently understood English to comprehend the State's plea offer and the decision whether to testify: "Taking into account the length of time Nanthavong has been in the United States, his commercial driving privileges, his work history, McCoy's interview, Nanthavong's own admissions, the testimony of [trial counsel] and the record as a whole, Nanthavong has failed to show the absence of an interpreter affected his decision whether to testify, the State's plea offer, or the trial proceedings." Based on these findings, the court concluded that Nanthavong had failed to show that his attorney was incompetent for not hiring an interpreter.

The court also noted that the case against Nanthavong was strong and concluded that Nanthavong had failed to show that he had been prejudiced by his attorney's performance.

In order to prove ineffective assistance of counsel, Nanthavong had to demonstrate both that his attorney's performance fell below the minimum level of competency, and that he was prejudiced as a result of his attorney's incompetence.⁴ With respect to the first prong of this test, Nanthavong was required to demonstrate that his attorney did not "perform at least as well as a lawyer with ordinary training and skill in the criminal law."⁵

⁴ *Risher v. State*, 523 P.2d 421, 424 (Alaska 1974).

⁵ *Id.*

The superior court's findings in this case are amply supported by the record. Based on the record, we agree that Nanthavong failed to meet the first prong of the *Risher* standard.

The decision of the superior court is AFFIRMED.